187

No. _____

Supreme Court, U.S.
FILED
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OFFICE OF THE CLERK

In the
SUPREME COURT OF THE UNITED STATES

Darren Michael Henry,
Petitioner

v.

United States of America,
Respondent

On Petition for Writ of Certiorari After Judgment by the United States Court of Appeals for the Eighth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

I. Whether a criminal defendant has the right to a jury instruction on the mandatory minimum sentence to be imposed if convicted of the charged offense under the Sixth Amendment to the Constitution of the United States of America.

II. Whether the mandatory minimum sentence for Production of Child Pornography as set forth in 18 U.S.C. 2251(e) is a violation of the Eighth Amendment to the Constitution of the United States of America with regard to the Petitioner's conviction.

III. Whether 18 U.S.C 2252(a)(5)(B), which prohibits the knowing possession of child pornography "that was produced using materials that have been mailed or shipped or transported in interstate or foreign commerce," is unconstitutional, as exceeding Congress's Commerce Clause authority, as applied to Petitioner's intrastate possession of child pornography on computer disks and memory cards that had traveled in interstate commerce.

TABLE OF CONTENTS

QUESTIONS PRESENTED.....i

TABLE OF AUTHORITIES.....iv, v, vi

PETITION FOR WRIT OF CERTIORARI.....1

OPINION BELOW.....1

JURISDICTION.....1

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED.....2

STATEMENT OF CASE.....3, 4

REASONS FOR GRANTING THE PETITION.....5

I(a). The petitioner's charges and conviction present an important question as to federal jurisdiction in the production, and possession, of child pornography 5

I(b). Circuits are split about what constitutes proof beyond a reasonable doubt that materials were transported in interstate or foreign commerce.....7

II. The Sixth Amendment Requires that the Jury Be Informed of Mandatory Minimums. 9

CONCLUSION.....14

APPENDICES: DISTRICT COURT AND COURT OF APPEALS OPINIONS, ORDERS, AND JUDGMENTS

Appendix A – Judgment U.S. Court of Appeals for Eighth Circuit.....1a
Appendix B – Opinion U.S. Court of Appeals for Eighth Circuit.....2a
Appendix C – Judgment U.S. District Court for N.D.....6a
Appendix D – Verdict U.S. District Court for N.D...22a
Appendix E – Order District Court Motion in Limine.....24a
Appendix F – Indictment.....31a

TABLE OF AUTHORITIES

CASES:

Gonzales v. Raich, 545 U.S. 1, 125 S.Ct. 2195 (2005).....5,6

Harmelin v. Michigan, 501 U.S. 957, 111 S.Ct. 2680 (1991).....8

Shannon v. United States, 512 U.S. 573 (1994).....12

Oregon v. Ice, ___ U.S. ____, 129 S.Ct. 711 2009).....12,13,14

United States v. Bausch, 140 F.3d 739 (8th Cir. 1998) *cert denied*.....7,8

United States v. Egenberger, 424 F.3d 803, 805 (8th Cir. 2005).....9

United States v. Lopez, 514 U.S. 549, 115 S. Ct. 1624 (1995).....5,6

United States v. Maxwell, 126 S.Ct. 321 (2005).....6

United States. v. Maxwell, 386 F.3d 1042 (2004).....6

United States v. Morrison, 529 U.S. 598, 120 S.Ct. 1740

(2000).....5,6

United States v. Pabon-Cruz, 391 F.3d 86 (2nd Cir. 2004).....12

United States v. Polizzi, 549 F.Supp.2d 308 (S.D.N.Y. 2008), *overruled*.....9,10,11,12

United States v. Polouizzi, 564 F.3d 142 (2nd Cir. 2009)....11

United States v. Wilson, 182 F.3d 737 (2000).....7

STATUTES

28 U.S.C. § 1254(1).....1

28 U.S.C. § 2251(a).....2,3,4,7,8,9

28 U.S.C. § 2251(e).....2,4,8

28 U.S.C. § 2252(a).....3,4

COURT RULES

Supreme Court Rule 13.1.....1

Supreme Court Rule 29.2.....1

OTHER AUTHORITIES

United States Constitution, Amendment 6.....2,9,10,11,12,13,14

United States Constitution, Amendment 8.....2,8,9

United States Constitution, Amendment 10.....7

United States Constitution, Article I, Section 8, Clause 3.....,4,5,6,7,8,9

PETITION FOR WRIT OF CERTIORARI

Petitioner, Darren Michael Henry, respectfully asks that a writ of certiorari be issued to review the judgment and opinion of the United States Court of Appeals for the Eighth Circuit, No. 09-3804, filed on November 30, 2010.

OPINION BELOW

The judgment of the district court (App. at 6a) is not reported. Likewise, the court of appeals decision (App., *infra*, 2a) is not reported. However, the district court's ruling on a motion in limine of the petition is reported at 639 F.Supp.2d 1023 (D.N.D.), denying the petitioner's request to instruct the jury of the mandatory minimum sentence. (App. at 24a).

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1). The decision of the United States Court of Appeals for the Eighth Circuit, from which petitioner seeks review was issued on November 30, 2010. This petition is filed within 90 days of the decision of United States Court of Appeals for the Eighth Circuit, under Rules 13.1 and 29.2 of this Court.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

I. *United States Constitution, Amendment 6* provides, in pertinent part:
"In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury..."

II. *United States Constitution, Amendment 8* provides, in pertinent part:
"Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."

III. The Commerce Clause of the United States Constitution, Article I, Section 8, Clause 3, provides: "The Congress shall have Power***To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes."

IV. Title 18 of the United States Code, Sections 2251(a) and (e), provide:

(a) "Any person who employs, uses, persuades, induces, entices, or coerces any minor to engage in, or who has a minor assist any other person to engage in, or who transports any minor in or affecting interstate or foreign commerce, or in any Territory or Possession of the United States, with the intent that such minor engage in, any sexually explicit conduct for the purpose of producing any visual depiction of such conduct or

for the purpose of transmitting a live visual depiction of such conduct, shall be punished as provided under subsection (e), if such person knows or has reason to know that such visual depiction will be transported or transmitted using any means or facility of interstate or foreign commerce or in or affecting interstate or foreign commerce or mailed, if that visual depiction was produced or transmitted using materials that have been mailed, shipped, or transported in or affecting interstate or foreign commerce by any means, including by computer, or if such visual depiction has actually been transported or transmitted using any means or facility of interstate or foreign commerce or in or affecting interstate or foreign commerce or mailed."

****

(e) "Any individual who violates, or attempts or conspires to violate, this section shall be fined under this title and imprisoned not less than 15 years...."

STATEMENT OF CASE

Following a jury trial, petitioner was convicted in the United States District Court for the District of North Dakota of one count of sexual exploitation of minors, in violation of 18 U.S.C. 2251(a) and 2251(e), and one count of possession of material involving the sexual exploitation of minors, in violation of 18 U.S.C. 2252(a)(4)(B) and 2252(b)(2). Petitioner was sentenced to 180 months of imprisonment. The court of appeals affirmed the petitioner's convictions finding Congress had authority to regulate such activities under the Commerce Clause and

the petitioner did not have a right to a jury instruction on the mandatory minimum sentence under the 6th Amendment to the Constitution. (App., *infra*, 24a)

In the Court of Appeals for the Eight Circuit, the petitioner argued the conviction could not be sustained under federal law, as the Government did not prove beyond a reasonable doubt that the petitioner committed the charged crimes in interstate commerce. The testimony at trial was not supported by any type of expert witness as to the interstate nature of computer disks or digital cameras.

The petitioner also did not admit to any of the jurisdictional elements of the crime. The district court relied on testimony by an officer, essentially stating he read the "made in" labels to determine the origination of the items in question. The petitioner was at no point accused of distributing any of the materials he was alleged to have produced through interstate commerce. Likewise, it was never alleged the minor victim was transported across State lines, or that the petitioner ever crossed State lines in the commission of any of the accused crimes.

The Court of Appeals for the Eight Circuit rejected petitioner's argument on the merits and affirmed his sentence. (App. at 2a.)

The basis for federal jurisdiction in the court of first instance is based upon 18 U.S.C. 2251(a) and 18 U.S.C. 2252(a), the Government relying on the Commerce Clause of the United States Constitution, Article I, Section 8, Clause 3 as a basis for the charges.

REASONS FOR GRANTING THE PETITION

I(a). The petitioner's charges and conviction present an important question as to federal jurisdiction in the production, and possession, of child pornography.

This case presents an important issue over federal jurisdiction in the prosecution of sex crimes involving minors. The activity surrounding the production of the alleged materials in the petitioner's case consisted of material produced entirely intrastate. The Government relied on the storage of these materials on items manufactured and sold in interstate commerce as the jurisdictional hook to bring the case within federal jurisdiction. None of the alleged materials were ever proved, or alleged, to have been transported, or sold in interstate commerce.

The Court has supported seemingly contradictory theories of intrastate commerce and whether its overall impact is great enough to substantially impact interstate commerce, allowing federal regulation. Justice O'Connor provided a seething dissent in *Gonzales v. Raich*, 545 U.S. 1, 42-74, 125 S.Ct. 2195 (2005). The decision in *Raich* provided the federal government with seemingly unrestrained power to regulate intrastate activity "so long as there is some implication by legislative design that regulating intrastate activity is essential...to the interstate regulatory scheme. *Id.* at 46. The decision in *Raich* seems to be in stark contrast to the *Lopez* and *Morrison* standards. *Lopez* declined to give federal jurisdiction over possession of a firearm within school zones, as there was no

tie to interstate commerce or economic value to the regulation. *United States v. Lopez*, 514 U.S. 549, 115 S. Ct. 1624 (1995).

Raich seems to fully allow the regulation of interstate commerce as long as Congress can identify the intrastate activity as part of some kind of interstate commerce or economic activity. *Raich* was applied to federal regulation of child pornography through *United States v. Maxwell,* 126 S.Ct. 321, (2005). The Court of Appeals for the Eleventh Circuit in *Maxwell* reversed a conviction of possession of child pornography stating intrastate possession could not be linked to interstate commerce simply because the images were stored on an item obtained through interstate commerce. *United States v. Maxwell*, 386 F.3d 1042, 1068-69 (2004) *overruled.*

Morrison does not obligate the courts to conclude that a regulated activity substantially affects interstate commerce simply because Congress has crafted findings stating that it does. *United States v. Morrison*, 529 U.S. 598, 614, 120 S.Ct. 1740, 1752 (2000). The inconsistent treatment of the Commerce Clause in these cases creates confusion as to the current application of the Commerce Clause. Continuing Federal intervention in intrastate activities will effectively result in nullification of the reserved powers of the States. The Federal Government effectively becomes a government no longer limited by its enumerated powers. *Raich* at 58, *Justice Thomas's dissent.*

The only offer of proof that the materials were produced with materials transported or transmitted through interstate commerce was a simple reading of the labels describing the location of the materials production.

The drafters of the constitution did not contemplate a world economy where it would be almost impossible for a citizen to purchase any items produced entirely of intrastate materials and means. The Tenth Amendment to the Constitution reserves all powers not granted to the Federal Government to the States. This area of regulation is not enumerated to the Federal Government through the Commerce Clause. An individual purchasing items at a local store hardly falls within the intended meaning of interstate commerce. As such, the Government has the burden to prove beyond a reasonable doubt that the petitioner purchased materials in interstate commerce, from out of state suppliers, to establish the jurisdictional hook of 18 U.S.C. § 2251(a).

I(b). Circuits are split about what constitutes proof beyond a reasonable doubt that materials were transported in interstate or foreign commerce.

The Courts of Appeals are in disagreement as what is needed to prove beyond a reasonable doubt the materials used in the production of child pornography were distributed through the channels of interstate or foreign commerce. *Wilson*, a Seventh Circuit case, implies that the Government must call an expert witness to establish a nexus between the materials alleged to have been obtained through means of interstate commerce and the production of pornographic materials. *See U.S. v. Wilson*, 182 F.3d 737 (2000). In contrast the Eight Circuit seemingly only requires it to be proven that any item used in production was made in another state, or foreign Nation. *See U.S. v. Bausch*, 140 F.3d 739 (8th Cir. 1998) *cert denied*, 119 S.Ct. 806 (1999) (jurisdictional nexus satisfied because jury found Bausch took child pornography photographs using a

Japanese produced camera that had been transported in foreign commerce).

This case also presents important issues regarding the minimum mandatory punishment set forth by 18 U.S.C. 2251(e). The petition in this case has been subjected to cruel and unusual punishment in violation of the United States Constitution, Amendment 8. The petitioner was sentenced to the minimum mandatory of fifteen (15) years imprisonment set forth by 18 U.S.C. 2251(e). This sentence is especially cruel considering the petition has the blessing of the alleged victim's father and the alleged victim has since given birth to the petitioner's child. The child will be forced to grow up without a father as a result of the sentence.

When determining whether a sentence constitutes cruel and unusual punishment, the Court should consider three factors: "(1) the inherent gravity of the offence, (2) the sentences imposed for similarly grave offenses in the same jurisdiction, and (3) sentences imposed for the same crime in other jurisdictions." *Harmelin v. Michigan*, 501 U.S. 957, 987, 111 S.Ct. 2680, 2697 (1991). This particular case does not involve the type of actions that 18 U.S.C. § 2251(a) intends to prohibit. The petitioner relationship with the alleged victim in this case has the blessing of the father and if not for this case, the father has indicated he would approve of a marriage between the individuals. The photographs at issue in the case were not productions of child pornography, but rather pictures taken during the coarse of a consensual relationship between the individuals.

The punishment is not only punishing the petitioner for his actions, but also punishing the child. The child will

not know the petitioner for the majority of this childhood and will suffer as a result. The Act purports to protect children, but in this instance is only harming the petitioner and alleged victim's child. The petition does not dispute that the violation of 18 U.S.C. 2551(a) is a serious crime, but the circumstances of this instance do not support a conviction under the statute.

II. The Sixth Amendment Requires that the Jury Be Informed of Mandatory Minimums

Defendant's proposed instruction and objection to the instruction given by the District Court were based on the well-reasoned decision in *United States v. Polizzi*, 549 F.Supp.2d 308 (S.D.N.Y. 2008), *overruled*, by Senior United States District Judge Jack B. Weinstein.

Lower courts are bound to follow United States Supreme Court precedent and are not bound to follow older Eighth Circuit precedent inconsistent with Supreme Court authority. *See United States v. Egenberger*, 424 F.3d 803, 805 (8th Cir. 2005) ("The district court does not continue to be bound by prior interpretations of the law that are contrary to the Supreme Court's most recent announcement."). Judge Weinstein's opinion in *Polizzi* provides an extensive and well-reasoned analysis as to why a jury should be instructed on the applicable mandatory minimum, including discussion of the reasons why older Circuit caselaw on this issue is no longer good law in light of recent United States Supreme Court precedent.

Judge Weinstein begins his analysis with a discussion of the history of the Sixth Amendment, which guarantees a defendant "[i]n all criminal prosecutions . . .

trial, by an impartial jury of the State and district wherein the crime shall have been committed." *Polizzi*, 549 F.Supp.2d at 404 *et seq.* The framers' understanding of the Sixth Amendment was that a jury has the power to refuse to convict on any basis, including an excessive penalty. *Id.* at 405-06. In particular, colonial and British jurors were selected from a pool of well-informed property owners who knew the parameters of the law and applicable punishment. *Id.* at 406. "Jury power not to convict was extensively exercised when the punishments that would be expected to follow from conviction were deemed excessive." *Id.* With their knowledge of potential punishments, juries at the time of the Sixth Amendment exercised their powers to, in effect, determine the sentence. *Id.* at 408-21.

In the Nineteenth and Twentieth Centuries, courts diverged from that historical understanding and sought to restrict the jury's discretion under the Sixth Amendment. *See Polizzi*, 549 F.Supp.2d at 420-25. However, recent decisions from the Supreme Court of the United States, including the *Apprendi-Booker* line of cases and cases interpreting the Confrontation Clause, have rejected attempts to limit the jury's powers. *See Polizzi*, 549 F.Supp.2d at 426-27. The Supreme Court has employed an analysis of the jury's historic role at the time of the adoption of the Sixth Amendment. *Id.* at 427-433.

Judge Weinstein then turned to an examination of the Second Circuit's prior case-law restricting the information to be given to the jury regarding sentencing and concluded that that case-law is inconsistent with the more recent Supreme Court cases. *See Polizzi*, 549 F.Supp.2d at 433-38. In order for a jury to fulfill its historical role as the representative of the community, the

jury must know the applicable sentence, including mandatory minimums. *Id.* at 439-40.

Judge Weinstein then goes on to discuss another consequence of failing to inform the jury of mandatory minimum sentences. Equal Protection and Due Process issues arise because some juries may have a member who is informed (or misinformed) about the applicable mandatory minimum and tells the other jurors, while some juries may have no member aware of even the existence of mandatory minimums. *See Polizzi*, 549 F.Supp.2d at 440-43.

Ultimately, Judge Weinstein determined that failure to inform the jury of the mandatory minimum violated Polizzi's Sixth Amendment and other rights and granted a new trial. *See Polizzi*, 549 F.Supp.2d at 443-49.

The Second Circuit recently decided the appeal of the *Polizzi*. *See United States v. Polouizzi*, 564 F.3d 142 (2nd Cir. 2009). The Second Circuit concluded that, based on its prior precedent, Polizzi had no right to an instruction on the applicable mandatory minimum. *Id.* at 160-61. However, the Second Circuit concluded that the District Court has the discretion to so instruct. *Id.* at 161-62.

The Second Circuit did not discuss the historical role of the jury, including the jury's knowledge of punishments, relied upon by Judge Weinstein. Accordingly, the Second Circuit's opinion does not address that historical role and the emphasis that the Supreme Court places on the jury's historical role in interpreting the Sixth Amendment.

In considering Judge Weinstein's analysis that the Supreme Court's recent precedents lead to the conclusion

that the jury should be instructed as to applicable mandatory minimums, the Second Circuit concluded that analysis was "'less an application of existing precedent than a prediction of what the Supreme Court will hold when it chooses to address this issue in the future.'" *Polizzi*, 564 F.3d at 160 (citation omitted). However, as discussed below, since there is no Supreme Court decision directly rejecting the Sixth Amendment argument made in *Polizzi* and in this case, consideration of what the Supreme Court would do is appropriate.

The primary prior decision upon which the Second Circuit relied was *United States v. Pabon-Cruz*, 391 F.3d 86 (2nd Cir. 2004). *Pabon-Cruz*, in turn, relied upon the Supreme Court's decision in *Shannon v. United States*, 512 U.S. 573 (1994). However, neither *Shannon* nor *Pabon-Cruz* address the Sixth Amendment argument raised here or in Judge Weinstein's opinion.

Shannon merely holds that an instruction informing the jury of the sentencing consequences of a finding of not guilty by reason of insanity is not required by statute or the federal criminal rules or practice. *See Shannon*, 512 U.S. at 587-88. *See also Shannon*, 512 U.S. at 575 ("In this case, we consider whether a federal district court is required to instruct the jury regarding the consequences to the defendant of a verdict of "not guilty by reason of insanity," either under the Insanity Defense Reform Act of 1984 or as a matter of general federal practice."). Thus, *Shannon* has no bearing on the Sixth Amendment constitutional analysis.

Additionally, the Supreme Court's recent decision in *Oregon v. Ice*, ___ U.S. ____, 129 S.Ct. 711 (2009),

strengthens the constitutional argument, particularly the principle that Sixth Amendment rights must be interpreted in accordance with historical practice. "The question here presented concerns a sentencing function in which the jury traditionally played no part: When a defendant has been tried and convicted of multiple offenses, each involving discrete sentencing prescriptions, does the *Sixth Amendment* mandate jury determination of any fact declared necessary to the imposition of consecutive, in lieu of concurrent, sentences?" *Id.* at 714.

In *Ice*, the Supreme Court employed a strong "historical roots" analysis of Sixth Amendment rights:

> Our application of *Apprendi*'s rule must honor the "long-standing common-law practice" in which the rule is rooted. *Cunningham [v. California], 549 U.S.[270] at 281 [2007].* The rule's animating principle is the preservation of the jury's historic role as a bulwark between the State and the accused at the trial for an alleged offense. See *Apprendi [v. New Jersey], 530 U.S. [466] at 477 [2000].* Guided by that principle, our opinions make clear that the *Sixth Amendment* does not countenance legislative encroachment on the jury's traditional domain. See *id., at 497 [].* We accordingly considered whether the finding of a particular fact was understood as within "the domain of the jury . . . by those who framed the *Bill of Rights*." *Harris v. United States, 536*

U.S. 545, 557 [] (2002) (plurality opinion).

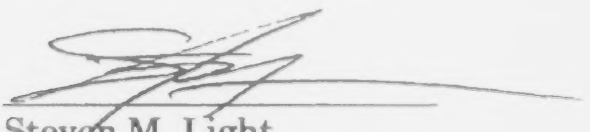
Ice, 129 S.Ct. at 717. In examining the history of the Sixth Amendment, the Supreme Court majority concluded that "[t]he historical record demonstrates that the jury played no role in the decision to impose sentences consecutively or concurrently." *Id.* In contrast, the historical record extensively discussed by Judge Weinstein demonstrates that, at the time the Sixth Amendment was adopted, juries were aware of the applicable punishments and used that information in reaching their verdict.

CONCLUSION

For all of the foregoing reasons, petitioner requests that this Court grant the petition for certiorari.

Dated: April 25, 2011.

Respectfully submitted,



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UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

NO: 09-3804

United States of America,
Plaintiff- Appellee

v.

Darren Michael Henry,
Defendant- Appellant

Appeal from U.S. District Court for the District of North Dakota- Bismarck
(4:09-cr-00006-DLH-1)

JUDGMENT

This appeal from United States District Court was submitted on the record of the district court and briefs of the parties.

After consideration, it is hereby ordered and adjudged that the judgment of the district court in this cause is affirmed in accordance with the opinion of this Court.

November 30, 2010

Order Entered in Accordance with Opinion:
Clerk, U.S. Court of Appeals, Eighth Circuit.

/s/ Michael E. Gans

United States Court of Appeals
FOR THE EIGHTH CIRCUIT

No. 09-3804

United States of America,	*	
	*	
Plaintiff-Appellee,	*	Appeal from the United
	*	States District Court
v.	*	District of North Dakota
	*	
Darren Michael Henry,	*	[UNPUBLISHED]
	*	
Defendant-Appellant.	*	

Submitted: October 22, 2010
Filed: November 30, 2010

Before MURPHY, BEAM, and BENTON, Circuit Judges.

PER CURIAM.

Darren Michael Henry appeals his convictions for sexual exploitation of a minor and possession of material involving the exploitation. Having jurisdiction under 28 U.S.C. § 1291, this court affirms.

Suspecting that Henry was involved in an inappropriate relationship with minor S.L., her mother contacted law enforcement. The North Dakota Bureau of Criminal Investigation ("BCI") seized Henry's computer.

Forensic analysis revealed sexually explicit images of S.L.; accompanying data indicated that at least one image was taken with a Canon PowerShot SX100 camera. After obtaining another warrant, BCI seized a camera of this model from Henry's home.

A two-count indictment charged Henry with sexual exploitation of a minor, 18 U.S.C. §§ 2251(a), 2251(e), and possession of material involving sexual exploitation of a minor, 18 U.S.C. §§ 2252(a)(4)(B), 2252(b)(2). The jury convicted on both counts. The sexual exploitation count carried a 180-month mandatory minimum sentence. 18 U.S.C. § 2251(e). The district court[1] sentenced Henry to 180 months' imprisonment, 60 months' supervised release, and a $200 special assessment.

Both crimes have an interstate of foreign commerce element. 18 U.S.C. §§ 2251(a), 2252(a)(4)(B). Henry challenges the sufficiency of the evidence that the electronic devices he used moved in interstate or foreign commerce. "We 'review[] the sufficiency of the evidence de novo, viewing the evidence in the light most favorable to the verdict. Reversal of a conviction is proper only if no reasonable jury could have found the defendant guilty beyond a reasonable doubt." *United States v. Pliego*, 578 F.3d 938, 941 (8th Cir. 2009) (quoting *United States v. Kent*, 531 F.3d 642, 651-52 (8th Cir. 2008)).

At trial, a BCI Special Agent testified that he dismantled the computer and photographed its hard drive, which stored the sexually explicit images. A label on the hard drive indicated that it was manufactured in

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[1] The Honorable Daniel L. Hovland, Chief Judge, United States District Court for the District of North Dakota. The Honorable Daniel L. Hovland stepped down as Chief Judge on October 31, 2009.

Singapore. The Agent also testified that he examined a tag on the camera, which indicated Japan as its place of manufacture. The district court received the camera and a photograph of the hard drive in evidence. While the camera and hard drive could conceivably have acquired the country labels without moving in foreign commerce, the government receives "the benefit of all reasonable inferences.'" *Pliego*, 578 F.3d at 941 (quoting *United States v. Termini*, 992 F.2d 879, 881 (8th Cir. 1993)). A reasonable jury could conclude beyond a reasonable doubt that the camera and hard drive bore the country labels because they originated abroad.

Henry also argues that the district court should have informed the jury of the exploitation count's mandatory minimum. "We review a district court's formulation of jury instructions for abuse of discretion and consider whether the instructions correctly state the applicable law." *Pliego*, 578 F.3d at 942 (quoting *United States v. Walker*, 428 F.3d 1165, 1171 (8th Cir. 2005). Henry points to *United States v. Polizzi*, 549 F. Supp. 2d (E.D.N.Y. 2008), which like this case involved child pornography. After initially refusing to instruct on the mandatory minimum, the district court eventually granted a new trial, reasoning that given the defendant's specific characteristics, the Sixth Amendment entitled the defendant to have the jury informed of the applicable sentence. *Polizzi*, 549 F. Supp 2d at 440, 446. On appeal, the Second Circuit vacated, holding that while instructing juries on mandatory minimum sentences may be appropriate under some circumstances, the defendant there had no right to a new trial. *United States v. Polouizzi*,[2] 564 F. 3d 142, 159-63 (2d Cir 2009).

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[2] The captions in the district court and the Second Circuit spelled the defendant's name differently.

In this circuit, "[t]he court need not instruct the jury that the defendant will receive a mandatory sentence if he or she is found guilty." *United States v. Thomas*, 895 F.2d 1198, 1200 (8th Cir. 1990) (citing *United States v. Goodface*, 835 F.2d 1233, 1236 (8th Cir. 1987)). After Thomas, the Supreme Court recognized that informing the jury of the consequences of a verdict may be appropriate under "limited circumstances" *Shannon v. United States*, 512 U.S. 573, 587 (1994). Henry has not shown that his case involves such circumstances.

Accordingly, we affirm.

United States District Court
District of North Dakota

United States of America — Judgment in a Criminal Case

v. — Case No: 4:09-CR-006

Darren Michael Henry — USM No: 10199-059

Steven M. Light
Defendant's Attorney

THE DEFENDANT:
[ ] pleaded guilty to count(s) ____.
[ ] pleaded nolo contendere to count(s) ___ which was accepted by court.
[X] was found guilty on counts 1 and 2 of the Indictment after plea of not guilty.

Accordingly, the defendant is adjudged guilty of such count(s), which involve the following offenses:

Title & Section	Nature of Offense	Date Offense Concluded	Count Number
18 U.S.C. §§ 2251(a) and 2251(e)	Sexual Exploitation of Minors	October 2008	1

Title & Section
18 U.S.C. §§ 2252(a)(4)(B) and 2252(b)(2)

Nature of Offenses
Possession of Material Involving the Sexual Exploitation of Minors

Date Offense Concluded
October 2008

Count Number
2

The defendant is sentenced as provided in pages 2 through 6 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

[ ] The defendant has been found not guilty on count(s) ____ and is discharged as to such count(s).

[ ] Count(s) ____ (is) (are) dismissed on the motion of the United States.

IT IS FURTHER ORDERED that the defendant shall notify the United States Attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid.

Date of Imposition of Judgment: November 23, 2009

/s/ Dan Hovland
Daniel L. Hovland, United States District Judge
November 24, 2009

IMPRISIONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a total term of **180 MONTHS on Count 1 (mandatory/minimum) and 41 MONTHS on Count 2, to run concurrent.**

[X] The court makes the following recommendations to the Bureau of Prisons:

The court recommends that the defendant be placed at FMC Rochester in Rochester, Minnesota due to this medical condition. In the alternative, the Court recommends that the defendant be placed at FPC Yankton in Yankton, South Dakota to be near his family. The Court also notes that the defendant was a federal law enforcement agent employed with the Bureau of Customs and Border Protection. He resigned on July 25, 2009.

[X] The defendant is remanded to the custody of the United States Marshal.

[ ] The defendant shall surrender to the United States Marshal for this district.

[ ] at ____ on ____.

[ ] as notified by the United States Marshal.

[ ] The defendant shall surrender for service of sentence at the institution designed by the Bureau of Prisons:

[ ] before ____ on ____ .

[ ] as notified by the United States Marshal.

[ ] as notified by the Probation or Pretrial Services Officer.

RETURN

I have executed this judgment as follows:

Defendant delivered on _____ to _____
At _____, with certified copy of this judgment.

United States Marshal
By _____
Deputy U.S. Marshal

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of **60 MONTHS of Count One and 60 MONTHS on Count Two, to run concurrent.**

The defendant must report to the probation office in the district to which the defendant is released within 72 hours of release from the custody of the Bureau of Prisons.

The defendant shall not commit another federal, state, or local crime.

The defendant shall not unlawfully possess a controlled substance. The defendant shall refrain from any unlawful use of a controlled substance. The defendant shall submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as directed by the court.

The defendant shall not possess a firearm, destructive device, or any other dangerous weapon.

[ ] The above drug testing condition is suspended based on the court's determination that the defendant poses a low risk of future substance abuse (Check if applicable)

The defendant has been convicted of an offense listed in the DNA Analysis Backlog Elimination Act of 2000 or the Justice for All Act of 2004. These acts require the defendant to cooperate in the collection of DNA as directed by the probation officer.

If this judgment imposes a fine or a restitution obligation, it is a condition of supervised release that the defendant pay in accordance with the Schedule of Payments set forth in the Criminal Monetary Penalties page of this judgment.

The defendant must comply with the standard conditions that have been adopted by this court as well as with any additional conditions on the attached page.

STANDARD CONDITIONS OF SUPERVISION

1) the defendant shall not leave the judicial district without permission of the court or probation officer;
2) the defendant shall report to the probation officer and shall submit a truthful and complete written report within the first five days of each month;
3) the defendant shall answer truthfully all inquires by the probation officer and follow instructions of the probation officer;
4) the defendant shall support his or her dependants and meet other family responsibilities;
5) the defendant shall work regularly at a lawful occupation unless excused by the probation officer for schooling, training or other acceptable reasons;

6) the defendant shall notify the probation officer ten days prior to any change or residence or employment;

7) the defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute or administer any narcotic or other controlled substance, or any paraphernalia related to such substances;

8) the defendant shall not frequent place where controlled substances are illegally sold, used, distributed, or administered;

9) the defendant shall not associate with any persons engaged in criminal activity, and shall not associate with any person convicted of a felony unless granted permission to do so by the probation officer;

10) the defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view of the probation officer;

11) the defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer;

12) the defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court;

13) as directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics, and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirements.

SPECIAL CONDITIONS OF SUPERVISION

1) The defendant shall participate in psychological/psychiatric counseling and/or a sex offender program, which may include inpatient treatment as approved by the probation officer. The Defendant shall abide by all rules, requirements and conditions of such program, including submission to risk assessment evaluations and physiological testing, such as polygraphs, and Abel testing, and shall take all prescribed medication.
2) The Defendant shall grant a wavier of this right of confidentiality in any records of mental health treatment imposed as a consequence of this judgment to allow the treatment provider to provide information to the probation officer to monitor the Defendant's progress. The probation officer shall disclose the Presentence Report, and/or any previous sex offender or mental health evaluations to the treatment provider.
3) The Defendant shall register with the state sex offender registration agency in any state where the Defendant resides, is employed, carries on vacation, or is a student, as directed by the probation officer. The probation officer will provide the state officials with any and all information required by the state sex offender registration agency and may direct the Defendant to report to that agency personally for additional processing, such as photographing and fingerprinting.
4) The Defendant shall submit his person, residence, workplace, vehicle, computer, and/or possessions to a search conducted by a United States Probation Officer based upon evidence of a violation of a condition of supervision. Failure to submit to search may be grounds for revocation, additional criminal

charges, and arrest. The Defendant shall notify any other residents that the premises may be subject to searches pursuant to this condition.

5) The Defendant shall abstain from the excessive use of alcohol and totally abstain from the use of illegal drugs or the possession of a controlled substance as defined in 21 U.S.C. § 802.
6) The Defendant shall submit to random substance abuse testing as directed by the supervision probation officer.
7) The Defendant shall participate in a program for substance abuse as approved by the supervising probation officer. That program shall include testing and inpatient our outpatient treatment or counseling by a support group.

CRIMINAL MONETARY PENALTIES

The defendant shall pay the following total criminal monetary penalties in accordance with the Schedule of Payments set forth on Sheet 5, Part B. The special assessment shall be due immediately and payable to the Clerk, U.S. District Court.

Total:	Assessment	$200 ($100 for each count)
	Fine	$0
	Restitution	$0

[ ] If applicable, restitution amount ordered pursuant to plea agreement.....$____

FINE

The above fine includes costs of incarceration and/or supervision in the amount of ____$.

The defendant shall pay interest on any fine of more then $2500, unless the fine is paid in full before the fifteenth day

after the date of judgment, pursuant to 18 U.S.C. § 3612(f). All of the payment options on Sheet 5, Part B may be subject to penalties for default and delinquency pursuant to 18 U.S.C. § 3612(g).

[ ] The court determined that the defendant does not have the ability to pay interest and it is ordered that:

[ ] The interest requirement is waived

[ ] The interest requirement is modified as follows:

RESTITUTION

[ ] The determination of restitution is deferred in a case brought under Chapters 109A, 100, 110A, and 113A of Title 18 for offenses committed on or after 09/13/1994, until up to 60 days. An amended Judgment in a Criminal Case will be entered after such determination.

[ ] The court modifies or waives interest on restitution as follows:

[ ] The defendant shall make restitution to the following payees in the amounts listed below.

If the defendant makes a partial payment, each payee shall receive an approximately proportional payment unless specified otherwise in the priority order of percentage payment column below.

Name of Payee	Amount of Loss	Restitution Ordered	% of Payment
Totals:		$_____	

SCHEDULE OF PAYMENTS

Payments shall be applied in the following order: (1) assessment; (2) restitution; (3) fine principal; (4) cost of prosecution; (5) interest; (6) penalties.

Payment of the total fine and other criminal monetary penalties shall be due as follows:

A [X] in full immediately.

B [ ] $ __ immediately, balance due(in accordance with C, D, or E);or

C [ ] not later than ___; or

D [ ] in installments to commence ___ day(s) after the date of this judgment. In the event the entire amount of criminal monetary penalties imposed is not paid prior to the commencement of supervision, the U.S. probation officer shall pursue collection of the amount due, and shall request the court to establish a payment schedule if appropriate; or

E [ ] in __ (e.g. equal, weekly, monthly, quarterly) installments of $___ over a period of ___ year(s) to commence ___ day(s) after the date of this judgment.

Special instructions regarding the payment of criminal monetary penalties:

[ ] The defendant shall pay the cost of prosecution.

[X] The defendant shall forfeit the following property to the United States:

Dell Dimension Tower computer, Serial Number HQVFF61; Cannon Powershot SX100 digital camera, Serial Number 5128220696, with Lexar 1 GF SD card; Polaroid 2 GB SD card; and a Cannon 16 MB SD card.

STATEMENT OF REASONS

I. COURT FINDINGS ON PRESENTENCE INVESTIGATION REPORT

A. [X] The court adopts the presentence investigation report without change

B. [ ] The court adopts the presentence investigation report with the following changes.

1. [ ] Chapter two of the U.S.S.G. Manual determination by court (including changes to base offense level, or specific offense characteristics):

2. [ ] Chapter Three of the U.S.S.G. Manual adjustment determinations by court (including changes to victim-related adjustments, role in the offense, obstruction of justice, multiple counts, or acceptance of responsibility):

3. [ ] Chapter Four of the U.S.S.G Manual determinations by court (including changes to criminal history category or scores, career offender, or criminal livelihood determinations):

4. [ ] Additional Comments or Findings (including comments or factual findings concerning certain information in the presentence report that the Federal Bureau of Prisons may rely on when it makes inmate classifications, designation, or programming decisions).

C. [ ] The record establishes no need for a presentence investigation report pursuant to Fed.R.Crim.P. 32.

II. COURT FINDINGS ON MANDATORY MINIMUM SENTENCE

A. [ ] No count of conviction carries a mandatory minimum sentence.

B. [X] Mandatory minimum sentence imposed.

C. [ ] One or more counts of conviction alleged in the indictment carry a mandatory minimum term or imprisonment, but the sentence imposed is below a mandatory minimum term because the court has determined that the mandatory minimum does not apply based on

[ ] findings of fact in this case

[ ] substantial assistance (18 U.S.C. § 3553(e))

[ ] The statutory safety value (18 U.S.C. § 3553(f))

III. COURT DETERMINATION OF ADVISORY GUIDELINE RANGE

Total Offense Level:	36
Criminal History Category:	1
Imprisonment Range:	188 to 235 months
Supervised Release Range:	60 to LIFE months
Fine Range:	$20,000 to 200,000

[X] Fine waived or below the guideline range because of inability to pay.

IV. ADVISORY GUIDELINE SENTENCING DETERMINATION

A. [ ] The sentence is within an advisory guideline range that is not greater than 24 months, and the court finds no reason to depart.

B. [ ] The sentence is within an advisory guidelines range that is greater than 24 months, and the specific sentence is imposed for these reasons.

C. [ ] The court departs from the advisory guideline range for reason authorized by the sentencing guidelines manual.

D. [X] The court imposes a sentence outside the advisory sentencing guideline system.

V. DEPARTURES AUTHORIZED BY THE ADVISORY SENTENCING GUIDELINES

A. The sentence imposed departs

[ ] below the advisory guideline range; or

[ ] above the advisory guideline range.

B. Departure based on

1. Plea Agreement

[ ] 5K1.1 plea agreement based on the defendant's substantial assistance;

[ ] 5K3.1 plea agreement based on Early Disposition of "Fast-track" program;

[ ] binding plea agreement for departure accepted by the court;

[ ] plea agreement for departure, which the court finds to be reasonable;

[ ] plea agreement that states that the government will not oppose a defense departure motion.

2. Motion Not Addressed in a Plea Agreement

[ ] 5K1.1 government motion based on the defendant's substantial assistance;

[ ] 5K3.1 government motion based on Early Disposition of "fast-track" Program;

[ ] government motion for departure;

[ ] defense motion for departure to which the government did not object;

[ ] defense motion for departure to which the government objected.

3. Other

[ ] Other than plea agreement or motion by the parties for departure

VI. COURT DETERMINATION FOR SENTENCE OUTSIDE THE ADVISORY GUIDELINE SYSTEM

A. The sentence imposed is
[X] below the advisory guideline range; or
[ ] above the advisory guideline range.

B. Sentence imposed pursuant to

1. Plea Agreement
[ ] binding plea agreement for a sentence outside the advisory guidelines system accepted by the court;
[ ] plea agreement for a sentence outside the advisory guideline system which the court finds to be reasonable;
[ ] plea agreement that states that the government will not oppose a defense motion to the court to sentence outside the guideline system
2. Motion Not Addressed in a Plea Agreement
[ ] government motion for a sentence outside of the advisory guideline system;
[ ] defense motion for a sentence outside of the advisory guideline system to which the government did not object;
[X] defense motion for a sentence outside of the advisory guideline system to which the government objected.
3. Other
[ ] Other than a plea agreement or motion by the parties for a sentence outside of the guidelines system

Reason(s) for Sentence Outside the Advisory Guidelines System

[X] the nature and circumstances of the offense and the history and characteristics of the defendant pursuant to 18 U.S.C. § 3553(a)(1);

[X] to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense (18 U.S.C. § 3553(a)(2)(A));

[X] to afford adequate deterrence to criminal conduct 18 U.S.C § 3553(a)(2)(B));

[X] to protect the public from further crimes of the defendant 18 U.S.C. § 3553(a)(2)(C);

[X] to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner 18 U.S.C. § 3553(a)(2)(D);

[X] to avoid unwarranted sentencing disparities amount defendants 18 U.S.C § 3553(a)(6);

[ ] to provide restitution to any victims of the offense 18 U.S.C. § 3553(a)(7);

Explain the facts justifying a sentence outside the advisory guideline system.

The total adjusted offense level for this offense is 36. With a total adjusted offense level of 36 and a criminal history category of 1, the defendant is subject to an advisory sentence range of 188-235 months. This offense requires a mandatory minimum sentence of 180-months imprisonment pursuant to 18 U.S.C. § 2251(e). The defendant recommended a sentence of 180-months. The mandatory minimum sentence of 180-months was ordered

which falls below the advisory Guideline range and is only 8-months less than the Government's recommendation. The Court believes that a sentence of 180-months can reasonably achieve the sentencing objectives of 18 U.S.C. § 3553(a).

VII. **COURT DETERMINATION OF RESTITUTION**

A. Restitution Not Applicable

VIII. **ADDITIONAL FACTS JUSTIFYING THE SENTENCE IN THIS CASE**

1) to deter criminal conduct; 2) to protect the public from further crimes; 3) to reflect the seriousness of the offense; 4) to promote respect for the law

Sections I, II, III, VII of the Statement of Reasons form must be completed in all felony cases.

Date of Imposition of Judgment: November 23, 2009

/s/ Dan Hovland

Daniel L. Hovland, United States District Judge
November 24, 2009

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NORTH DAKOTA
NORTHWESTERN DIVISION

United States of America,	*	
	*	
Plaintiff,	*	**VERDICT**
	*	
v.	*	Case No. 4:09-cr-006
	*	
Darren Michael Henry,	*	
	*	
Defendant.	*	

---

1. We the Jury, find the Defendant, Darren Michael Henry,

   _____ Not Guilty __X___ Guilty

   of the offense of sexual exploitation of a minor, as set forth in Count One of the indictment.

2. We the Jury, find the Defendant, Darren Michael Henry,

   _____ Not Guilty __X___ Guilty

   of the offense of possession of material involving the sexual exploitation of a minor, as set forth in Count Two of the indictment.

Dated this 22nd day of July, 2009.

_____/s/_____
Foreperson

After you have completed this verdict form, have your fireperson sign and date it, and inform the Judge you have reached a verdict.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NORTH DAKOTA
NORTHWESTERN DIVISION

United States of America,	*	
	*	
Plaintiff,	*	ORDER DENYING
	*	DEFENDANT'S
v.	*	MOTION IN LIMINE
	*	
Darren Michael Henry,	*	
	*	Case No. 4:09-cr-006
Defendant.	*	

Before the Court is the Defendant's Motion in Limine filed on July 9, 2009. See Docket No. 26. The Government filed a response in opposition to the motion on July 9, 2009. See Docket No. 27. The Court denies the motion for the reasons set forth below.

The defendant, Darren Michael Henry, was charge in a two-count indictment with sexual exploitation of a minor and possession of material involving the sexual exploitation of a minor pursuant to 18 U.S.C. § 2251(e), Henry is subject to a 15-year mandatory minimum sentence

if convicted of sexual exploitation of a minor. Henry requests that the Court instruct the jury that he faces a 15-year mandatory minimum sentence if convicted of this offense.

Henry relies on United States v. Polizzi, 549 F. Supp. 2d 308 (E.D.N.Y. 2008), to support the claim that he has a Sixth Amendment right to have the jury instructed that he faces a 15-year mandatory minimum sentence if convicted of sexual exploitation of a minor. In Polizzi, the court originally denied the defendant's request for a jury instruction on the mandatory minimum sentence but later reversed that decision and granted a new trial. 549 F. Supp. 2d at 404, 449-50. The court found that the defendant "did have a Sixth Amendment right to a jury informed of the five-year minimum." Id. at 438.

On appeal, the Second Circuit Court of Appeals held that the defendant did not have a Sixth Amended right to a trial by a jury that had been instructed on the applicable

mandatory minimum sentence. United States v. Polouizzi, 564 F. 3d 142, 161 (2d Cir. 2009). The Second Circuit determined that its decision was controlled by United States v. Pabon-Cruz, 391 F. 3d 86 (2d Cir. 2004). In Pabon-Cruz, the Second Circuit concluded that a defendant has "no legal right to a charge informing the jury of the sentencing consequences of its decisions." 391 F. 3d at 94.

The decision in Pabon-Cruz was controlled by Shannon v. United States, 512 U.S. 573 (1994) (finding that the defendant was not entitled to an instruction informing the jury of the consequences of a not guilty by reason of insanity verdict), in which the United States Supreme Court stated:

> The Jury's function is to find the facts and to decide whether, on those facts, the defendant is guilty of the crime charged. The judge, by contrast, imposts sentence on the defendant after the jury has arrived at a guilty verdict. Information regarding the consequences of a verdict is therefore irrelevant to the jury's task. Moreover, providing jurors sentence information invites them to ponder matters that are not within their province, distracts

> them from their factfinding responsibilities, and creates a strong possibility of confusion.

512 U.S. at 579. The Supreme Court did allow for the possibility that a jury instruction may be necessary "under certain limited circumstances", such as when a judge may need to provide an instruction to counter a misstatement made in front of the jury. Id. at 587.

It is well-established in the Eighth Circuit that a defendant is not entitled to have the jury informed of the sentencing consequences of its decision. In United States v. Goodface, 835 F. 2d 1233 (8th Cir. 1987), the Eighth Circuit Court of Appeals rejected the defendant's claim that the jury should have been instructed that a guilty verdict would trigger a five-year mandatory minimum sentence. The Eight Circuit held that the penalty to be imposed on a defendant is not a matter for the jury and, instead, "the jury's duty is to determine the guilt or innocence of the accused solely on the basis of the evidence adduced at trial. Its role is unaffected if Congress validly chooses to remove

sentence discretion from the court." 835 F. 2d at 1237 (internal citation omitted); see United States v. Wilcox, 487 F. 3d 1163, 1173 (8th Cir. 2007) ("Details regarding potential punishment were irrelevant to the jury's duty to determine whether [the defendant] should be convicted of the charged offenses."); United States v. Delgado, 914 F. 2d 1062, 1067 (8th Cir. 1990) ("Punishment is within the province of the court."); United States v. Thomas, 895 F. 2d 1198, 1200 (8th Cir. 1990) ("sentencing procedures or details regarding a defendant's possible punishment are irrelevant to the issues that a federal jury must decide. To inform a federal jury about a defendant's punishment would only introduce improper and confusing considerations before it.").

Henry only cites one case (United States v. Polizzi, 549 F. Supp. 2d 308 (E.D.N.Y. 2008)) to support the contention that the Sixth Amendment requires a jury instruction on a mandatory minimum sentence. However,

the Second Circuit Court of Appeals vacated the order granting a motion for a new trial in that case and held that the defendant did not have a Sixth Amendment right to an instruction on a mandatory minimum sentence.

It is clear that in the Eight Circuit a defendant is not entitled to have the jury informed of the sentencing consequences of its verdict. Thus, the Court find that Henry is not entitled to an instruction that informs the jury that he faces a 15-year mandatory minimum sentence if convicted of sexual exploitation of a minor. The Court is unaware of any case law from the Eighth Circuit or the United States Supreme Court that supports a finding that Henry's Sixth Amendment rights will be violated if the jury is not instructed on the 15 year mandatory minimum sentence he faces if convicted. Further, one of the "certain limited circumstances" contemplated by the Supreme Court in Shannon has not presented itself in this case. Therefore,

the Court **DENIES** the Defendant's Motion in Limine (Docket No. 26).

IT IS SO ORDERED.

Dated this 16th day of July, 2009.

/s/ Daniel L. Hovland
Daniel L. Hovland, Chief Judge
United States District Court

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NORTH DAKOTA
NORTHWESTERN DIVISION

United States of America,	)	INDICTMENT
	)	
v.	)	Case No. _____
	)	
Darren Michael Henry,	)	
	)	

Violation: 18 U.S.C. §§ 2251(a), 2251(e),2252(a)(4)(B),2252(b)(2),and 18 U.S.C. § 2253(a)

COUNT ONE

Sexual Exploitation of Minors

The Grand Jury Charges:

Beginning in about January 2008 and continuing until about October 2008, in the District of North Dakota,

DARREN MICHAEL HENRY

used, persuaded, induced, enticed, and coerced a minor to engage in sexually explicit conduct for the purpose of

producing visual depictions of such conduct, which such visual depictions were digitally produced using materials that had been mailed, shipped, and transported in interstate commerce by any means, including by computer;

In violation of Title 18, United States Code, Sections 2251(a) and 2251(e).

COUNT TWO

Possession of Material Involving the Sexual Exploitation of Minors

The Grand Jury Further Charges:

Beginning in about January 2008 and continuing until about October 2008, in the District of North Dakota,

DARREN MICHAEL HENRY

did knowingly possess several computer files which had been produced using materials which had been mailed, shipped or transported in interstate or foreign commerce, and which contained numerous visual depictions, the production of which involved the use of minors engaging in

sexually explicit conduct and which depictions were of such conduct;

In violation of Title 18, United States Code, Sections 2252(a)(4)(B) and 2252(b)(2).

FORFEITURE ALLEGATION

The Grand Jury Further Charges:

Upon conviction of violating Title 18, United States Code, Sections 2251 and 2252, as charged in this Indictment,

DARREN MICHAEL HENRY

shall forfeit to the United States any and all matter which contains visual depictions produced, transported, shipped, and received in violation thereof and any and all property used and intended to be used in any matter and part to commit and to promote the commission of such violations, including, but not limited to, the following:

Dell Dimension Tower computer, Serial Number HQVFF61;

Cannon Powershot SX100 digital camera, Serial Number 5128220696, with Lexar 1 GB SD Card;

Polaroid 2 GB SD card; and

Cannon 16 MB SD card.

By virtue of commission of one or more of the felony offenses as charged in this Indictment, all right, title, and interest in the above-described property is vested in the United States and is hereby forfeited to the United States, pursuant to Title 18, United States Code, Section 2253(a).

A TRUE BILL:

__/s/_____
Foreperson

__/s/_____
DREW H. WRIGLEY
United States Attorney

GLD:jcv